LE COPY

Office - Supreme Court
FILED
JUL 2 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 105

FRANCIS G. A. O'NEILL,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

E. H. BURGESS,
ARVIN J. ALEXANDER,
ROBERT F. EBINGER,
KENNETH H. EKIN,
Counsel for Respondent.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

	PAGE
Opinion of the Court Below	1
Jurisdiction	2
Supplemental Statement of the Case	2
Summary of Argument	3
Argument	3
Conclusion	9

Table of Citations

Cases

Asphrodites v. Standard Fruit & Steamship Co., 108 F. 2d 728	8
Atchison, Topeka & Santa Fe Ry. Co. v. Simmons, 153 F. 2d 206	6, 8
Diecks Lumber & Coal Co. v. Bowen, 19 F. 2d 732	8
Fink v. N. Y. C. R. Co., 144 O. S. 1	8
Gleeson v. Virginian R. R. Co., 140 U. S. 435	8
Gray v. B. & O. R. Co., 24 F. 2d 671	4, 8
Jesionowski v. Boston & Maine R. Co., 329 U. S. 452	6
Johnson v. United States, 333 U. S. 46	6
Lowden et al. v. Hanson, 134 F. 2d 348	7, 8
Shankweiler v. B. & O. R. Co., 148 F. 195	8
Southern Ry. Co. v. Derr, 240 F. 73	8
Sweeney v. Erving, 228 U. S. 233	4, 5
Terminal R. R. Assoc. of St. Louis v. Staengel, 122 F. 2d 271	6

Statutes

Judicial Code:	
28 U. S. C. 1254(1)	1
28 U. S. C. 1732	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 105

FRANCIS G. A. O'NEILL,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. OPINION OF THE COURT BELOW

On March 2, 1954, the United States Court of Appeals for the Sixth Circuit in an opinion reported in 211 F. 2d 190 reversed the judgment of the United States District Court for the Southern District of Ohio and remanded the case for a new trial (R. 299). The order of the District Court overruling respondent's motion for a new trial was entered September 8, 1952 (R. 282).

II. JURISDICTION

The petitioner has invoked the jurisdiction of this Court under the provisions of the Act of June 25, 1948, C. 646, 62 Stat., 928; U. S. C., Title 28, Section 1254 (1).

III. SUPPLEMENTAL STATEMENT OF THE CASE

Evidence was produced by respondent that petitioner was in charge of the work of installing the ash pan and he had as a helper an employee by the name of Roy Jaynes (R. 53). The helper was operating the pull jack pursuant to the directions of the petitioner (R. 55). Petitioner failed to call Roy Jaynes as a witness. Respondent's witness, Kessler, testified that the practice of the respondent was to buy its nuts and bolts pursuant to specifications and to inspect the nuts and bolts either at the plant of the manufacturer or make the inspection at the storehouse of the respondent (R. 116).

Dr. Ralph Pickett, a witness for the respondent, testified that he was called to the scene of the accident and that he gave petitioner first aid and then took him to the hospital where X-rays were taken of petitioner's back. Dr. Pickett testified that the X-rays revealed that there was an old compression of the eighth dorsal vertebrae which antedated the accident of June 22, 1948 (R. 129).

IV. SUMMARY OF ARGUMENT

The Court of Appeals for the Sixth Circuit has correctly decided that where a plaintiff offers no evidence pertaining to the issue of negligence other than the statement that an accident happened, and the explanatory facts are sufficient to rebut an inference of negligence, he has failed to meet his burden of proof. On the record presented to it, the Court of Appeals correctly held that a verdict should have been directed for the respondent. The Court of Appeals, contrary to the position of the respondent, has given the petitioner a second opportunity to prepare a better record by granting a new trial. Inasmuch as a new trial was ordered, the Court of Appeals did not pass upon all of the points alleging error. It did, however, correctly find that there was reversible error in the trial court's charge to the jury wherein medical reports, admissible solely for the purpose of discrediting a witness, were treated as positive evidence of the opinions contained therein. In view of the record as a whole, and the Court's charge in particular, the Court of Appeals was compelled to order a new trial, and its decision is not in conflict with the decisions of this Court or Courts of Appeals of other circuits.

V. ARGUMENT

In deciding that a new trial must be ordered in this case, the Court of Appeals did not pass upon all of the points of error assigned by the respondent. Having decided that petitioner had not made out a case for submission to the jury under the doctrine of *res ipsa loquitur*, the Court dealt sparingly with the other manifest errors in the record. The trial court's charge to the jury (R. 224-244, 257-

262) consisting of 27 pages was made the subject of ten separate exceptions in addition to the general objections to the charge as a whole by the respondent in its appeal to the Court of Appeals. A reading of that rambling, disconnected, and at times incoherent, charge, apart from any other consideration, establishes the need for a new trial in this case. With considerable charity, the Court of Appeals in its opinion (R. 307-308) expressed the hope that by consideration on a retrial the objections to the charge would be eliminated without difficulty. Since a retrial has been ordered, the Court found it unnecessary to rule upon other objections relating to the conduct of counsel and the right of the trial judge to grant a remittitur instead of a new trial (R. 307).

Petitioner has presented four questions urging review by this Court. The first two may be considered together.

QUESTIONS 1 AND 2

Petitioner contends that the decision of the Court of Appeals is in conflict with the decisions of this Court, and the decisions of the courts of the other circuits. The principal case relied on by the petitioner is the case of *Sweeney v. Erving*, 228 U. S. 233. Petitioner contends under the rule established in this case that if res ipsa loquitur is applicable, it is mandatory for the Court to submit the case to the jury. Petitioner contends that an inference of negligence under res ipsa loquitur means that the jury may accept or reject the explanation offered, but not the Court. These same arguments were advanced in the case of *Gray v. B. & O. R. Co.*, 24 F. 2d 671 (C. A. 7th). The Court after quoting the identical paragraph quoted by petitioner at page 12

of his brief correctly disposed of these arguments. At page 673 of its opinion the Court stated:

> "Taken in connection with the whole paragraph quoted, we understand that, in using the words 'that they make a case to be decided by the jury' the Court meant that, unexplained, the facts make a case for the jury. Otherwise, that clause would be inconsistent with those other clauses, 'it is evidence to be weighed, not necessarily to be accepted as sufficient,' and 'they call for explanation or rebuttal, not necessarily that they require it.'
>
> "If we should hold, under the facts in this case, that on the theory of res ipsa loquitur the case must go to the jury such a holding would not be in harmony with Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597, when the Court resorted to a well known rule:
>
> > " 'The rule for testing the direction of a verdict, as often has been held, is that when the evidence is undisputed, or of such conclusive character that if a verdict were returned to one party, whether plaintiff or defendant, it would have to be set aside in the exercise of sound judicial discretion, a verdict may and should be directed for the other party.' "

In discussing the Sweeney case the Circuit Court of Appeals in the instant case held as follows (R. 304):

> "But, as stated in Sweeney v. Erving, 228 U. S. 233, where the rule is well analyzed, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference, that they furnish circumstantial evidence of negligence where directed evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient, and that other evidence may explain or completely rebut the inference.
>
> "Under the rule the burden of proof does not shift from the plaintiff to the defendant, and if the plaintiff

offers no evidence pertaining to the issue of negligence other than the facts of the occurrence of the injury, and the explanatory facts are sufficient to rebut the inference, the plaintiff fails to meet the burden and fails to make a case. Sweeney v. Erving, supra, p. 241. Where the explanatory evidence is contradictory or of such a character as to justify different inferences as to defendant's exercise of due care, it is for the jury to determine whether the inference of negligence has been rebutted by the explanatory evidence. But where the possible inference of negligence is clearly overcome by undisputed evidence free from any reasonable adverse inference, or where the uncontradicted explanatory facts establish non-liability as a matter of law, it is the duty of the court to direct a verdict for the defendant. The application of the rule does not change the general rule that where the evidence as a whole is insufficient to support a verdict for the plaintiff, defendant's motion for a directed verdict should be sustained."

The instant case is not in conflict with the decision in *Johnson v. United States*, 333 U. S. 46, and *Jesionowski v. Boston & Maine R. Co.*, 329 U. S. 452. In neither of these cases was there uncontroverted testimony which overcame the inference of negligence as a matter of law.

The decision of the Sixth Circuit is not in conflict with the decisions of other courts of other circuits. Two cases are cited by petitioner as being in conflict with the decision of the Sixth Circuit. They are *Atchison, Topeka & Santa Fe Ry. Co. v. Simmons*, 153 F. 2d 206, (C. A. 10), and *Terminal Railroad Assn. of St. Louis v. Staengel*, 122 F. 2d 271 (C. A. 8). In the Atchison case the Court held that if the evidence is so conclusive that the minds of reasonable men cannot differ as to the conclusion to be drawn from the evidence, a directed verdict is justified. In the Terminal Railroad Assn. case the Court held that a directed verdict

should be granted if the entire evidence is such that the presumption cannot stand against it.

The Court of Appeals for the Sixth Circuit correctly held that the facts were undisputed; that the bolt was not manufactured by the appellant; that it was a new bolt selected by petitioner from regular stock which the respondent had purchased from a manufacturer in the usual course of business without notice of any defect; that there was no evidence of any kind in what way it was defective or that it was not a hidden defect, or that the respondent knew or should have known that it was defective and that as a matter of law such a purchaser from a manufacturer is not chargeable with negligence if after passing it on to others in the usual course of business it proves defective (R. 304, 305).

The petitioner concurs in this principle of law but argues that this principle applies between a retailer and purchaser and not to an employer and employee. For obvious reasons no authority is cited by petitioner to support his argument. In the case of *Lowden et al v. Hanson*, 134 F. 2d 348 (C. A. 8th), 1943, the plaintiff was an employer, the defendant a railroad and the action was brought under the Federal Employers' Liability Act. In this case the center spindle of a spring switch stand broke and injured the plaintiff. The Court stated at page 351 of its opinion:

> "The equipment having been purchased from a reputable manufacturer we are clear that this defendant could not be charged with negligence because of any structural or inherent defect which was *not* patent at the time of its installation.
>
> * * * * * *
>
> "Under the undisputed evidence we are of the view that there was no negligence in failing to discover an

> alleged structural defect nor in failing to dismantle and subject the instrumentality to a microscopic inspection, there being no evidence of a custom to submit appliance to such a test."

Petitioner states that the Circuit Court resorted principally to two early decisions of the Sixth Circuit to support the conclusion that the District Court should have directed a verdict. The cases referred to by the petitioner are *Shankweiler v. B. & O. R. Co.*, 148 F. 19[illegible] (C. A. 6) and *Southern Ry. Co. v. Derr*, 240 F. 73, (C. A. 6). Petitioner's statement that said cases do not represent the law today is without merit. Petitioner cites no cases in support of this bold assertion. These cases have been consistently cited without reversal, criticism or qualification. The Shankweiler case and Southern Ry. Co. case have not only been reversed, but they are in accord with the following cases in the Fifth, Seventh, Eighth and Tenth Circuits: *Diecks Lumber & Coal Co. v. Bowen*, 19 F. 2d 732 (C. A. 8); *Gray v. B. & O. R. Co.*, 24 F. 2d 671 (C. A. 7); *Asprodites v. Standard Fruit & Steamship Co.*, 108 F. 2d 728 (C. A. 5); *A. T. & S. F. Ry. Co. v. Simmons*, 153 F. 2d 206 (C. A. 10); *Lowden et al v. Hanson*, 134 F. 2d 348.

The cases of *Gleeson v. Virginian R. R. Co.*, 140 U. S. 435, and *Fink v. N. Y. C. R. Co.*, 144 O. S. 1, cited by petitioner, involved derailments which are entirely different factual situations from the instant case. As stated in *Gray v. B. & O. R. Co.*, supra, at page 674 of the opinion:

> "When the maxim 'res ipsa loquitur' applies the question as to whether the case should be submitted to the jury is one to be determined upon the facts in each case."

QUESTION 3

Questions 3 and 4 pertain to questions that *may occur* at the retrial of this case and are not proper questions for review. Aside from this, however, the Court of Appeals held that irrespective of Sec. 1732, Title 28 U. S. C. A., the X-ray reports were admissible if a proper foundation is laid. The Court held as follows (R. 306 and 307):

> "Appellee contends that irrespective of the statutory provision the report was admissible on cross-examination of Dr. Pickett to show the data on which Dr. Pickett's opinion was based, and that Dr. Pickett's opinion was not in accord with such data. Where a foundation is properly laid such evidence is admissible on cross-examination for the purpose of discrediting the witness, but the use of such evidence should be strictly limited and the jury carefully instructed about its limited use."

QUESTION 4

It is admitted by petitioner that it was error for the District Court to comment to the jury on the contents of the X-ray reports. Petitioner, however, states that the error was not prejudical. For the purpose of the retrial the District Court will not want to commit any error regardless of whether it is prejudicial or not. We submit, however, that for the trial court to inform the jury that they had the evidence of the other doctors — doctors who were not called as witnesses, constituted prejudicial error (R. 240 and 241).

VI. CONCLUSION

Petitioner has asked this Court to reverse the judgment of the Court of Appeals remanding the case for a new trial and to order final judgment for the petitioner in accordance with the judgment of the District Court. This position is taken despite the fact that in ordering a new trial the Court

of Appeals found that it was unnecessary to pass upon all of the assigned points of error. Such action would require this Court to pass upon matters not considered by the Court of Appeals. In granting a new trial, it is submitted that the Court of Appeals has accorded the petitioner the unusual privilege of a second day in court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

E. H. Burgess,
Arvin J. Alexander,
Robert F. Ebinger,
Kenneth H. Ekin,
Counsel for Respondent.

June 28, 1954